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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 561 - 562

UNITED STATES OF AMERICA

v.

HAROLD GOTTFRIED and PURE ROCK MINERAL SPRINGS CORPORATION,

Petitioners.

UNITED STATES OF AMERICA

v.

HAROLD GOTTFRIED, JOSEPH FORMAN and WILLIAM STANTON,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Harold Gottfried, Pure Rock Mineral Springs Corporation, Joseph Forman and William Stanton, respectfully pray that a writ of certiorari issue to review the final judgments of the United States Circuit Court of

Appeals for the Second Circuit, affirming several judgments of the United States District Court for the Southern District of New York adjudging the petitioners guilty after conviction and fixing sentences.

Petitioners Gottfried and Pure Rock Mineral Springs Corporation were convicted of having made and filed false and fraudulent statements in the matter of sugar consumption to the O.P.A. Petitioners Gottfried, Forman and Stanton were convicted of conspiracy to defraud the United States, in procuring a false report to be filed, and by depriving it of the faithful services of its investigator.

Petitioners join their several requests for a writ of certiorari pursuant to Rule 48 of the Rules of this Court.

Opinion Below.

The opinion of the Circuit Court of Appeals, dated January 2, 1948, appears at R., p. ~~2430~~ 2462 and is reported at ..... Fed. (2) ..... The judgments of the District Court appear at R. pp. 2428-2435.*

Statement of Matter Involved.

Petitioners Gottfried and Pure Rock Mineral Springs Corporation were indicted in two counts for violating *Title 18, Section 80, U. S. Code.* The first count charged that the defendants had fraudulently overstated to the O.P.A. their sugar consumption for 1941; the second count charged the defendants with fraudulently certifying to that fact.

In a second indictment, consolidated for trial with the above, petitioners Gottfried, Forman, and Stanton were

*Unless otherwise indicated, all numeral references hereafter will indicate folios in the record.

charged with having conspired, together with one George Long, in violation of *Title 18, Section 88, U. S. Code,* to defraud the United States of the faithful services of Stanton, an O. P. A. investigator. The indictment alleges that after Stanton had been assigned to investigate the statement which Pure Rock had filed with O. P. A., Gottfried paid Forman $1,500 in order to get Stanton to quash the investigation, and that Stanton's subsequent report falsely exonerated Gottfried and Pure Rock (R., pp. 13-28).

Pure Rock is a corporation, located in Ellenville, Ulster County, New York, and engaged in bottling and distributing soft drinks (393-4). Gottfried, during most of the time involved herein, was president and sole stockholder of Pure Rock (854). Forman, an attorney, practicing in Ulster County, had occasionally acted as counsel for Pure Rock (4576, 4581, 5184, 5367). Stanton was, in 1942-1943, an O. P. A. investigator, who made the Pure Rock investigation (71, 2383, 2529, 3705), and who resided in Ulster County. Gottfried had varied business interests and never assumed the direct management of Pure Rock, employing managers (Dwyer, succeeded by Long) for that purpose, visiting the plant at Ellenville only on occasion, and drawing no salary (2576, 3164-68, 4126-7, 4507, 4301-3, 2577-8, 4515).

The essence of the offenses, as presumably found by the jury, is as follows: In April, 1942, Dwyer, then manager of the plant, sent to Gottfried, then on active military service at Sheepshead Bay, New York City, a filled-in form for sugar registration, for his signature, because the president's signature was required (4526-7). Gottfried signed the statement and it was filed with the O. P. A. on April 29, 1942 (263-4). A year later, O. P. A. received an anonymous letter alleging the statement to be false in that it doubled the amount of sugar the company had used in 1941 (2381, 3506).

Stanton was assigned to investigate (2381), and saw Long, who was then in active management of the company. Long called Gottfried (1631) and told him of the pending investigation, and was told that the 1941 sugar base was inflated. Gottfried then retained Forman to represent him. Long met with Forman, who said that he could adjust the matter and asked for $1,500 (1641, 1643-5). Subsequently, Gottfried and Long met with Forman at the Hotel Pierre in New York (1653) and later Gottfried gave Long $1,500, which was paid to Forman. Stanton filed a report with O. P. A. that the sugar registration statement in question was correct (1664). Forman paid him $200.

At the trial on the consolidated indictment, the principal evidence for the prosecution was the testimony of Dwyer and Long, and an allegedly "voluntary" statement by Stanton which implicated Forman although not admitted as to him. All of the defendants took the stand and squarely contradicted Dwyer and Long. There was evidence that Dwyer and Long had been stealing from Gottfried (Dwyer, 1215, 4130-4, 4388-9, 4391-2, 4399-4405; Long, 1710, 1733, 1738, 1769-72, 1800, 1805, 1827-29, 1957, 1963, 4612-39), and that Long had attempted to blackmail Gottfried when the latter compelled him to make partial restitution (1837-8, 1844-7, 1720-1, 1836-7). Stanton's statement was obtained under circumstances set forth below, which make its admission one of the issues for which review is sought.

The defendants objected before and at the trial to the composition of the grand and trial juries (85-95, 226, 241-244, 3458, 3465, 6512, 6523, 6879-80). The lists of jurors systematically exclude all but three counties of the eleven in the Southern District (155-9, 201, 7216). These three are the Metropolitan counties of New York and Bronx (New York City) and Westchester (adjoining New York City).

The scene of the alleged offenses, the place of business of the corporate defendant, and the residences of Forman and Stanton and of their character witnesses, were all in Ulster County, which is excluded from the Southern District jury list.

Another issue revolves around the foreman of the jury, Van Voorhis. In the course of the trial, Gottfried's counsel had charged this juror with having falsely answered on the *voir dire,* but the trial judge refused to excuse him until the conclusion of the trial (6846). Subsequently, Van Voorhis was accused of misconduct, and of having improperly entered the jury room and communicated with other jurors *after having been excused* (5345-9, 6495-6500). The trial court refused to conduct an inquiry into such prejudicial misconduct, although it was promptly requested (6847, 6955, 6876, 6899).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U. S. C. A., Section 347(a)).

Questions Presented.

(1) Were the petitioners deprived of a fair trial, and their rights under the Fifth and Sixth Amendments to the Constitution, by reason of the systematic exclusion from jury service of residents of eight rural counties of the eleven counties comprising the Southern District, and by restrictive and discriminatory selection of jurors solely from the three counties of the metropolitan New York area, i.e., New York, Bronx, and Westchester (Point I, *infra.*).

(2) Were the petitioners denied a fair trial, and deprived of their rights under the Fifth and Sixth Amendments, by reason of the trial court's refusal to excuse the foreman of the jury, after discovery that he had answered falsely on the *voir dire,* until the jury was about to retire; and the refusal by the courts below of petitioners' requests for an inquiry into alleged prejudicial and improper influence on the jury by the above foreman, *after* he had been excused, arising from the presence of the discharged juror in the jury room while the jurors were deliberating upon the evidence, and improper and prejudicial statements made by the discharged juror (Point II, *infra.*).

(3) Were the petitioners deprived of a fair trial by the admission into evidence of an alleged statement in the nature of a confession by the defendant Stanton, procured through

(a) misuse by the government of the writ of habeas corpus *ad testificandum.*

(b) denial to defendant Stanton, while a prisoner in confinement, of the right to counsel, in regard to new charges.

(c) improper and incorrect legal "advice" to Stanton by government counsel while in the custody of the government, and also in the presence of the grand jury; and improper instruction by the foreman of the grand jury acting on advice of government counsel (Point III, *infra.*).

(4) Were the defendants denied a fair trial by reason of the consolidation for trial of the indictment charging conspiracy against petitioners Forman, Gottfried and Stanton, with the indictment against Pure Rock Mineral Springs and Gottfried for an earlier and distinctly separate substantive offense.

(5) Were petitioners Gottfried and Forman deprived of a fair trial by the denial to them of a severance upon the admission, as against Stanton alone, of the alleged "confession".

(6) Was prejudicial and reversible error committed by the trial court in permitting cross-examination of Stanton concerning his reasons for having claimed constitutional privilege against self-incrimination when questioned before the grand jury.

(7) Did the Statute of Limitations bar the indictment founded on the fraudulent written statement.

Petitioners assign as error the negative answers of the Court below to the foregoing questions.

Reasons for Granting the Writ.

I.

The petitioners were deprived of a fair trial and their rights under the fifth and sixth amendments because of the exclusion from jury service of residents of eight of the eleven counties in the district, and the discriminatory selection of jurors solely from the three counties of metropolitan New York.

Petitioners, before the trial, at its inception, and at the close, challenged the array of grand and petit jurors on the ground that residents of only three of the eleven counties in the district were called for jury service (85, 95, 226, 241-2, 244, 3458, 3465, 6512, 6523, 6879-80).

The testimony of the clerk and deputy clerk of the district court, at a hearing held on motions before trial, estab-

lished that the names of prospective jurors eligible for jury service in that district are selected from the registered voting lists, and the telephone directories of New York, Bronx and Westchester Counties (155-6, 160). These sources are the sole sources used to find names of prospective jurors, although residents of other counties may occasionally volunteer for service.

Lists of the panels called from 1940 to 1946 (7216) show that altogether about 42,000 persons were summoned for petit jury service during that period; that only seventy of them lived outside of New York, Bronx and Westchester, and none in Ulster or Orange; and that of these seventy, all but *thirteen* were listed in the New York City telephone directory (206-8). For the same period about 9,500 grand jury veniremen were called; only thirty-nine of them resided in a county other than New York, Bronx or Westchester; and of these latter only *four* had no listing in the New York City telephone book (209-10).

The jurisdiction of the court below extends to the counties of Columbia, Dutchess, Greene, Orange, Putnam, Rockland, Sullivan and Ulster, in addition to New York, Bronx and Westchester. *Title 28, section 178, United States Code.* It is beyond dispute that the residents of the eight counties first named are systematically and intentionally excluded from jury service.

Thus, in a district comprising approximately 6,100 square square miles, there have been excluded all persons resident in approximately 5,500 square miles, with the result that all jurors save those who volunteer are drawn from approximately six hundred square miles (World Almanac, 1946, 744). The effect is to [illegible]ve defendants of trial by residents of 90% of the area [illegible] district. On a popula-

tion basis, this represents an exclusion of 545,779 persons (World Almanac, 1946, 477).

This Court may take judicial notice of the fundamental differences which exist in the economic, social, ethnologic, psychological, educational and occupational characteristics —in short, in every sphere where significant differences can exist—between the urban population within the Metropolitan Area of New York City and the residents of the rural counties outside the Metropolitan Area, excluded from jury service.

The eight up-State counties excluded consist in the main of farming communities and towns and villages.

Consequently, the systematic exclusion of residents of these counties is not only a *geographical* exclusion; it is an exclusion of an *entire and different group or class* from the petit and grand jury lists, and operates to deprive a defendant of a jury selected from a cross-section of the population of the district.

The exclusion of *any* significant group of the community from jury service is a ground for reversal. *Ballard* v. *United States,* 329 U. S. 187 (1946); *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217 (1940); *United States* v. *Glasser,* 315 U. S. 60 (1942).

Geographical discrimination alone would appear to justify reversal for, as stated in the *Thiel* case (329 U. S. at 220):

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury *drawn from a cross-section of the community.* Smith *v.* Texas, 311 U. S. 128, 130; Glasser *v.* United

> States, 315 U. S. 60, 85. This does not mean, of course, that every jury must contain *representatives of all the economic, social, religious, racial, political and geographical groups of the community;* frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials *without systematic and intentional exclusion* of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. The fact lies at the very heart of the jury system. To disregard it is to open the door to class distinction and discrimination which are abhorrent to the democratic ideals of trial by jury." (Italics added.)

In the instant case, not only was there "systematic and intentional exclusion" of *geographical* groups of the community, but as a necessary consequence, economic, social and political groups as well.

Certainly when persons from the rural part of the district (e.g., Forman and Stanton) are on trial for a transaction which originated there, it falls short of the requirements of the Constitution and the standard set by this Court to subject such defendants to the verdict of jurors with an exclusively metropolitan background, who are strangers to him in outlook and living habits. Especially is this true in a criminal case, where character witnesses (here from the rural areas) are an important element of the defense. *United States* v. *Johnson,* 323 U. S. at 279. Such procedure deprives the jury institution of its very essence by opening the door to class distinctions.

No refinement of statistics can justify the exclusion of the up-State jurors, even if geography were the only ele-

ment; certainly no basis has been shown for ignoring the other elements traditionally associated with the concept of a jury of the vicinage. The effect of the decision below is not only to condone the "long practice" in the past, but to sanction it in perpetuity.

The government has sought to justify this restrictive, exclusionary, and discriminatory method of selecting jurors by reference to an old statute (Judiciary Act of 1789, 1 St. at L. 88, Title 28, Sec. 413, U. S. C.) which authorizes the courts to limit jury lists. However, in *May* v. *United States*, 199 Fed. 53, 59 (C. C. A. 8, 1912), cert. den. 229 U. S. 617, it was held in reference to this statute that, without an order of the court directing such division, the jurors must be chosen from the entire district. The opinion of the court below brushes the *May* case aside on the ground urged by the government below (Brief, p. 23) that it has been overruled by *Lewis* v. *U. S.*, 279 U. S. 63.

No such problem was presented in the *Lewis* case, which dealt with the special transitory situations arising from the creation of a new judicial district. In such cases, section 59 of the Judicial Code (Sec. 121, Tit. 28, U. S. C.) provides for transfer to the new district on application, and the defendant expressly disclaimed any desire to be tried there (see opinion below, 22 F. (2d) at 764).

The presumption of regularity established by the *Lewis* case should not be extended to a case such as this where the absence of an order is conceded. Indeed, the *Lewis* case turned precisely on the fact that *there was no express absence of an order*. The Court in that case observed (at 73): "And even if it can be regarded as essential (under the statute) * * * that the judge should have given written direction to draw the jurors from part of the district only, still,

as the contrary is not expressly shown, such a direction may be taken as sufficiently established by the presumption of regularity. See *Steers* v. *U. S.,* 112 C. C. A. 423, 192 Fed. 1, 4." (Italics added.)

All the more should it not be extended to a case such as this where such an order could not have been entered consistently with the applicable statute or the Constitution. The statute, while relaxing the requirement that jurors must be drawn in all instances from the entire district, authorizes the doing so only in such manner "so as to be most favorable to an impartial trial, and so as not to incur any unnecessary expense, or unduly burden the citizens of any part of the district with such service." It is made plain that convenience is not an alternative to impartiality but is subservient to it. Impartiality is *first* demanded, and only thereafter is convenience to be considered.

The statute never contemplated, and does not authorize, an order permanently truncating a judicial district containing eleven counties into only three counties for jury purposes. This is clear from the language of the section itself; it is supported by related provisions such as Section 53 (Sec. 114, Tit. 28, U. S. C.) dealing with divisions of districts, and Section 59 (Sec. 121, Tit. 28, U. S. C.) dealing with new districts—both of which grant the defendant the right to trial by a jury of his vicinage; and it is confirmed by the traditional regard of Congress for venue in criminal cases and the applicable rule of construction laid down by this Court (*United States* v. *Johnson, supra*). Indeed, if Congress had *itself* undertaken to do so, its action would conflict with the requirement of the Sixth Amendment that a defendant be tried "by an impartial jury of the . . . district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

In sum, taking into consideration all of the differences between the residents of the excluded counties and the included counties, the practice of selecting jurors from only three of the eleven counties in the district resulted in the denial to the defendant of a trial by a fair and impartial jury representing all groups and a cross-section of the district, one of the basic rights of a citizen in a democratic community.

II.

The petitioners were denied a fair trial and their rights under the fifth and sixth amendments, because of the prejudicial misconduct of the foreman of the jury and the trial court's failure to rectify such prejudices.

The fairness and impartiality of the verdict is subject to considerable doubt because of the conduct of the foreman of the jury, Van Voorhis, both before and after his discharge as a juror.

On the *voir dire,* Van Voorhis answered in the negative to the question as to whether he previously served as a juror in criminal cases (254, 5703-8, 5713-9). This answer was false. Van Voorhis had served as a juror in at least seven prior criminal cases. Defense counsel, immediately upon learning of the untruthfulness of Van Voorhis' answer to such an obviously important question, moved that the court immediately excuse him and substitute an alternate (5704-8, 5351, 6323). The court refused to take any action and the trial continued (5726). It was not until after the court had charged the jury, and it was about to leave the courtroom for its deliberations, that Van Voorhis was excused (6784-6843, 6843-6846).

The court, in excusing him at this late date, admitted in effect that Van Voorhis was not qualified to sit as a fair and impartial juror. That being the case, it is submitted that the presence of such a disqualified juror in the jury box, from the time the original objection to him was made until the closing of the trial when he was excused, prejudiced the defendants' right to a fair trial by an impartial jury.

It is true that trial courts admonish juries not to discuss the evidence, and possible guilt or innocence, among themselves from day to day as a trial progresses. But the realities of human nature render it difficult to believe that twelve men will sit in a jury box for eight or nine weeks and never discuss among themselves the trial which absorbs so much of their daily time, and presumably, their interest. If only as a precautionary safeguard, therefore, the foreman should have been removed from the jury when the charges were made. The vacillation of the trial court left a disqualified juror (the foreman) in a positon where he could—and did—talk to, influence, and prejudice members of the jury during the course of the trial.

It should be noted, furthermore, that defendants' counsel had, during the trial, informed the court that the foreman's attitude was hostile to the defendants (5346-5347, 6494-6500). An instance was cited to the court of the foreman's refusing to look at defense exhibits, when the defense counsel passed them to the jury (5347).

The court was also informed that Van Voorhis was discussing the case with other jurors, contrary to admonitions of the court, and proof of this was offered by independent sworn testimony (6494). At a hearing in chambers, a witness testified to hearing the foreman, on March 14, discussing with two other jurors, outside the courthouse, the judge's attitude toward the prosecutor (6495-6500).

Finally, not only was a hostile juror, charged with misconduct, and who had answered falsely on the *voir dire*, allowed to continue to sit with the jury throughout the course of the trial, but *after* he was excused, this same juror entered the jury room while the jury was deliberating (6957). He remained there for five or ten minutes, finally being removed, in an angry mood, and not without some difficulty, by the clerk of the court (6954-7).

On the date set for sentencing, counsel learned for the first time of the discharged juror's unauthorized and prejudicial presence in the jury room, and immediately moved to set aside the verdict and requested an inquiry as to what if any communication Van Voorhis had had with the other jurors in the course of their deliberations (6957). This was refused. Earlier, while the jury was out, counsel had also called the court's attention to a report that Van Voorhis, on the day he was discharged, had publicly stated in the courthouse that he had already lined up seven jurors for conviction (6871, 6956). A request for an inquiry into that charge had also been denied (6872).

There is no more fundamental right that a person charged with a crime can have, than the right to trial by a fair and impartial jury. This elementary right has meaning only where the jury is composed of honest and impartial jurors, free from the taint of prejudice, and where the jury can pass upon the evidence "free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." *Mattox* v. *U. S.*, 146 U. S., 140, 149-50.

Neither of these elements, indispensable to a fair jury trial, were present in the instant case. The foreman of the jury, having served in many prior criminal cases, was ap-

parently so eager to serve on another one, that he was willing to conceal his participation in other trials. Finally, although no longer a juror, and hence a stranger to the cause, he entered the jury room, interrupting its deliberation—all this against a background of hostile and prejudicial conduct and statements by him.

The grounds on which the Court below disposed of this matter hardly seem adequate. As to the false answer, it is said that the Court excused the foreman, which was all the defendants asked. But justice deferred may well be justice denied. As to the later misconduct, it is said that the issue was not properly raised. The motions were made in open court, in the presence of the required witnesses, as had been prior motions addressed to the conduct of this juror. The trial judge left the district immediately thereafter, having denied bail, and defendants were forced to apply to the Court of Appeals for bail. Shortly after the argument on the application, the government itself moved for a remand to inquire into these very matters. This was denied with an opinion (R. p. 2446) which defendants interpreted as calling upon *them* to so move. This they did., in vain (R. pp. 2448-61). It would seem, therefore, that the petitioners, convicted on the basis of presumptions rather than by an impartial jury, should not be pilloried by procedure.

It is the contention of petitioners that the trial court erred in refusing to remove Van Voorhis when the original objection was made; that the trial court erred again in refusing upon request to inquire into Van Voorhis' presence in the jury room; and that Van Voorhis' continued presence in the jury box, although not qualified to sit as a juror, and his subsequent presence as a stranger to the jury's deliberations, combined to deprive the petitioners of their right to a fair and impartial trial by jury.

III.

The trial court erred in admitting the alleged confession of petitioner Stanton which was obtained by coercion and unlawful means.

While a Federal prisoner on an unrelated offense (2271), petitioner Stanton was brought to New York City on a writ of habeas corpus *ad testificandum,* which writ called for his testimony before the grand jury on June 8, 1945, and his return "immediately" to the penitentiary at Danbury, Connecticut (2271, Defendant's Exhibit XX). Despite this, he was kept in New York City for fourteen days after his appearance before the grand jury, and it is uncontroverted that the return in purporting to state that he was "produced in court" on June 11th, 14th, 15th, 16th, 18th and 20th, is false (Defendant's Exhibit XX).

While refusing to answer "on the ground that it might incriminate without counsel, without legal advice" (7068) Stanton was harassed by the Asistant U. S. Attorney through repeated questioning sessions, was told that he could not have counsel, that he had to answer questions put to him in private sessions unless he claimed constitutional grounds (7041-3), and was threatened with "punishment for obstruction of justice" (7039-40). Stanton's counsel was refused access to the office of the United States Attorney while Stanton was there, and was unable to consult with his client (2751-6).

Stanton was improperly instructed by the Assistant U. S. Attorney in the presence of the grand jury; and the grand jury foreman acting on the advice of the prosecutor instructed Stanton that he could not discuss even with his own counsel the matter of his appearance before the grand jury (7093-5, Government's Exhibit 52).

The physical conditions under which Stanton was detained in New York resulted in an impairment of his health (1002, 960, 935-6, 938-44, 2164-6, 2174, 2322-3).

It is submitted that the foregoing facts bring the procedure within the range of judicial condemnation as in: *McNabb* v. *United States,* 318 U. S. 332 (1943); *Anderson* v. *United States,* 318 U. S. 350 (1943). They appear to satisfy even the stringent majority requirements of such cases as *Lyons* v. *Oklahoma,* 322 U. S. 596 and *United States* v. *Bayer,* 331 U. S. 543.

Therefore, taking into consideration the circumstances surrounding petitioner Stanton's allegedly voluntary confession, including the abuse of process by the government in relation to the writ of habeas corpus *ad testificandum,* the denial to defendant Stanton while a prisoner of the right to counsel, and the intimidatory and coercive circumstances of his confinement and questioning by the prosecutor, both privately and before the grand jury, it was error for the trial court to admit the tainted statement thus obtained from Stanton.

Conclusion.

For all of the foregoing reasons, the petitioners respectfully pray that a writ of certiorari issue to review the final judgments of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

February 17, 1948.

C. E. Cropley, Esq.
Clerk, United States Supreme Court
Washington, D. C.

Re: United States *vs.* Gottfried, *et al;*
October Term, Nos. 561-562.

Dear Sir:

Will you kindly call to the attention of the Court the subjoined Additional Argument in Support of Petition, based upon a decision rendered by the Court of Appeals for the District of Columbia on February 2, 1948, after the filing of the above-named petition for certiorari.

Respectfully,

Joseph L. Weiner

Additional Argument in Support of Petition.

Item 7 (p. 7) of the Petition alleges as error the ruling that prosecution for the substantive crime was not barred by the statute of limitations. The opposite result was reached in *Marzani* v. *United States*, decided by the Court of Appeals for the District of Columbia on February 2, 1948 (per Prettyman, J.). The statutes involved and the basis for the decision are set forth in the following excerpts from the opinion:

> "Two statutes are involved. The first is that under which the indictment was laid, which is Section 80, Title 18, of the United States Code, in its present form an act of June 18, 1934,[2] with minor changes by an act of April 4, 1938;[3] Section 35 of the Criminal Code. For ease in discussion, we shall refer to the pertinent clause of its statute as the False Claims Act. That clause provides:
>
> > '. . .; or whoever shall knowingly and wilfully . . . make . . . any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.'
>
> "The other statute is Section 590a of Title 18 of the United States Code, which is an act of August 24, 1942,[4] as amended July 1, 1944,[5] and October 3, 1944;[6] Section 19(b) of the Contract Settlement Act of 1944 and

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(2) 48 Stat. 996.
(3) 52 Stat. 197.
(4) 56 Stat. 747.
(5) 58 Stat. 667.
(6) 58 Stat. 781.

Section 38 of the Surplus Property Act of 1944. For ease in discussion we shall refer to this statute as the Suspension Act. In pertinent part it provides;

> 'The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, . . . shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress.'

"The question before us is whether the Suspension Act applies to offenses under the False Claims Act.

"We see no escape from the conclusion impelled by two decisions of the Supreme Court, *United States* v. *Noveck*[7] (and its companion cases, *United States* v. *McElvain*[8] and *United States* v. *Scharton*[9]) and *United States* v. *Gilliland.*[10]

"In *United States* v. *Noveck,* the question was whether a statute which read, 'That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, . . . the period of limitation shall be six years',[11] applied to perjury in an income tax return. The indictment alleged that the perjury was for the 'purpose of defrauding the United States'. The Supreme Court held that the six-year statute did not apply, because defrauding the United States is not an element of the crime of perjury. The language of that statute of limitations is the same

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(7) 271 U. S. 201, 70 L. Ed. 904, 46 S. Ct. 476 (1926)
(8) 272 U. S. 633, 71 L. Ed. 451, 47 S. Ct. 219 (1926)
(9) 285 U. S. 518, 76 L. Ed. 917, 52 S. Ct. 416 (1932)
(10) 312 U. S. 86, 85 L. Ed. 598, 61 S. Ct. 518 (1941)
(11) 42 Stat. 220 (1921)

as that of the Suspension statute here involved; in fact, that statute was the predecessor to this one.

"In *United States* v. *McElvain, supra,* the Court held that the six-year statute of limitations involved in *United States* v. *Noveck* did not apply to a conspiracy to defraud the United States by making a false income tax return. In *United States* v. *Scharton, supra,* the indictment was for an attempt to evade taxes by falsely understating taxable income. The defendant pleaded the statute of limitations. The United States contended that attempts to obstruct or defeat the lawful functions of any department of the Government, if accompanied by dishonest methods, are attempts to defraud the United States. The Court held that the six-year limitation applicable to offenses involving the defrauding of the United States, was not applicable to the offense described in that indictment.[12]

"The United States seems to agree with the foregoing view of the *Noveck* and its allied cases. It says that the Suspension Act 'was modeled upon the proviso' in the 1921 Act; that the 1921 and 1926 provisos 'are in all essential respects indentical with' the present Suspension Act; and that 'said cases were decided in accord with the principle first enunciated in *United States* v. *Noveck,* to wit, that in order to be affected by the suspension statute "defrauding or an attempt to

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[12] Other cases referred to in the briefs in this connection are *Bailey* v. *United States,* 13 F. 2d 325 (C. C. A. 9th, 1926); *Weinhandler* v. *United States,* 20 F. 2d 359 (C. C. A. 2d, 1927), *cert. denied,* 275 U. S. 554, 72 L. Ed. 423, 48 S. Ct. 116 (1927); and *Falter* v. *United States,* 23 F. 2d 420 (C. C. A. 2d, 1928), *cert. denied,* 277 U. S. 590, 72 L. Ed. 1003, 48 S. Ct. 528 (1928). In the *Bailey* case, the court held that defrauding the United States was a statutory ingredient of the offense of uttering and publishing a forged indorsement to a Government check with intent to defraud the United States. In the *Weinhandler* case, the court held that fraud is an element of the crime of embezzlement, and that, therefore, the six-year limitation in the 1921 proviso applied. In the *Falter* case, the court held that a conspiracy to commit a civil fraud is a crime under the conspiracy statute.

defraud" the United States must be an *ingredient* under the statute defining the offense.'

"In *United States* v. *Gilliland, supra,* the question was whether the False Claims Act was restricted to matters in which the Government has some financial or proprietary interest. The Court held that it was not. The conclusion was premised largely on the fact that by amendment in 1934[13] Congress had eliminated from the statute as it had theretofore existed[14] the words 'or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States,' and that the legislative history of the amending act showed that this omission was deliberate and intentional. Thus, the Court held that defrauding the United States in a pecuniary or financial sense is not a constituent ingredient of offenses under the False Claims Act.

"It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such defrauding of the United States is not an essential ingredient of offenses under the False Claims statute. If perjury on an official document required to be filed under a federal statute, the making of false income tax returns and an attempt to evade taxes are not defrauding the United States within the meaning of a statute of limitations, we do not see how making a false statement

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[13] 48 Stat. 996.

[14] 40 Stat. 1015 (1918).

in the course of an inquiry into one's qualifications for federal employment can be." (Footnotes in original.)

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